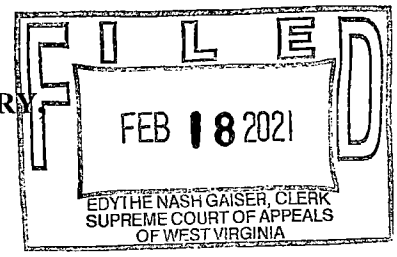
# IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**No. 20-0857**




**TIMOTHY J. GREGORY AND JANICE L. GREGORY,**
**Plaintiffs Below, Petitioners,**

**v.**

**JACK O. LONG AND LORA A. LONG,**
**Defendants Below, Respondents**

## PETITIONERS' REPLY TO RESPONDENTS' BRIEF

J. Burton Hunter, III
J. Burton Hunter, III and Associates, PLLC
Counsel for the Petitioners
One West Main Street
Buckhannon, WV 26201
304-472-7477
304-472-0641 (facsimile)
hunterjb@hunterlawfirm.net
WV State Bar ID 1827

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## PETITIONERS' REPLY TO RESPONDENTS' BRIEF

Come now the Petitioners, Timothy J. Gregory and Janice L. Gregory, who reply to the Respondents' Brief as follows:

Petitioners respectfully note to the Court that each counsel has the highest fiduciary responsibility by the oath taken, their admission to the bar, and as attorneys practicing before the bar of the Court to make accurate representations and argument to the Court. Under "Procedural History", page 1, the Respondents paraphrase of the first paragraph:

> ...The original complaint alleged that the Petitioners had a right-of-way across Respondent' real estate by deed ad the original complaint recited numerous deeds in support of their contention that they had a written right-of-way...(emphasis added)

However, the following in the Respondents' "Statement of the Case", page 3, more accurately states:

> The complaint states that the Petitioners are the owners of several tracts of real estate that they have acquired by various deeds totaling 152.11 surface acres, more or less...

Petitioners never alleged the existence of a written right-of-way and, at the time of filing had not discovered and were, therefore, not aware that the right-of-way in question was a county road which had been clearly and accurately identified as such in the official Upshur County Map prepared by Deputy Clerk A. B. Brooks in 1905, which is further referenced below.

In paragraph 2 of the Procedural History, page 1, Respondents state:

> ...The Respondents, Jack O. Long and Lora A. Long, acknowledged the existence of the roadway on their real estate by prescription and stated that the width of the roadway as being nine (9) or ten (10) foot wide depending on the evicting location...

Respondents then state immediately thereafter:

> ...The Respondents denied the existence of a prescriptive right-of-way and have never acknowledged the existence of a prescriptive right-of-way...

It is reasonable to assume that the second sentence should read, "The Petitioners denied the existence of a prescriptive right-of-way.". That is correct. There has never been one witness, document, recorded instrument, or evidence of any kind to support a finding or conclusion of a prescriptive right-of-way.

Nor do the findings of the Court in the Order Granting the Defendants Summary Judgment on this issue make any finding of fact supporting the finding of prescriptive right, and Petitioners' expert, the only expert in the case, John W. Fisher, II, rendered a definitive opinion that there is no evidence of a prescriptive easement.

Professor Fisher taught the subject of real estate, including right-of-way law, to the majority of West Virginia lawyers who practice today over a distinguished 40 year career and has been identified by this Court in the case of McClung Investments, Inc., v. Green Valley Community Public Service District, 485 S.E.2d 434, 199 W.Va. 490 (1997), as "The foremost authority in this field (real estate contract law) in the State.", by the Honorable Justice Menis Ketchem.

Professor Fisher is the author of numerous West Virginia University College of Law, Law Review articles and, particularly, *"A Survey of the Law of Easement in West Virginia"*, 112 W.Va.L.Rev. 637 (2010) which is "...a comprehensive article explaining the law of easements".

In regard to Respondents' counsel's statement, "The opinion expressed by Professor John W. Fisher, III is a great story with no evidence to support the bright line of Ryan et. al. v. Monongalia County Court", counsel's comment is dismissive, perfunctory, unsupported by any law of fact, and a bit disrespectful to an expert of Professor Fisher's stature, especially since

Respondents have no expert with a contrary opinion, No qualified expert would render such an opinion.

Respondents' counsel, during the deposition conducted on January 17, 2020, inquired of Professor Fisher about the Ryan case as follows:

> Q. How does that sort of square up with the Ryan Monongahela County Court Case, the 1920 case that talked about the ways in which the public could acquire a right of way? Basically, how does a roadway become public if there is no documentation as to people deeding it, work on it or --

Professor Fisher replied:

> ...A. Okay. We still have much the same problem today...
>
> ...A. A couple years ago they passed - quote - an Orphan Roads Act. You have subdivisions which are being developed by private developers and they are dedicating roads into those subdivision for public use.
>
> Now there may be a right of way for the public to use those roads, but the state's saying we do not have an obligation to maintain those roads. So, you know, that's sort of the same type of thing that we're dealing with here.
>
> The person did not lose their right of ingress and egress to their property. The state simply are saying we are not going to maintain this road as one in which public funds are expended. You know, they don't plow, they don't -- but the right of way --...

There was further exchange pertaining to the initial question as follows:

> ...Q. They don't put gravel on them, they don't do anything --
>
> A. Right. The right of way --
>
> Q. -- grade them?
>
> A. The right of way **is still there until it is terminated according to the provisions of the statute.(emphasis added)**
>
> Q. So going back prior to the Brooks' map being published, the surveyor would have gone in and said okay, I want this road included?
>
> A. They would have said this is a road in which we are going to have the people of the county work on it in order to make it passable for ingress and egress...

On another issue in which Respondents' counsel had focused, is the fact that the subject right-of-way "dead-ended" at the Petitioners' property. That exchange is as follows:

> ...Q. Usually those roads would be through roads and they would go somewhere; would they not? They wouldn't dead end?
>
> A. Probably most of them would connect up places, yes.
>
> Q. This one is a dead-end road; is it not?

A. It is my understanding it is a dead-end road.

Q. Is that a little unusual for a county road?

A. There is a church on this road, which I don't know if that was the distinguishing feature or not. I know in the affidavit --

Q. At the very beginning of the road?

A. It looked like it was where this road intersected --

Q. -- Grand Camp?

A. I don't remember the names of the roads, but it was some distance. I don't know whether it was, you know, 20 feet, 50 feet, 100. But the affidavit indicated there were other roads on this map that dead ended, so not every road completed a loop or circle to someplace else.

Q. So would it be possible --or let me backup again. If the surveyor perceived that it was necessary for the county court to accept this road as you said, they would have submitted documentation to accept the road at that point in time, or they didn't even really have a vote, the county commission, if the surveyor set it?

A. I think they would have had to take some action to negate it.

Q. Some affirmative action somewhere?

A. Right, to negate it.

Q. Would you believe then, sir, that this would be a question of fact since there is no documentation that the surveyor ever submitted this to the county court?

A. No, I do not. I think, you know, **the information in this case is as probably as compelling as you can find as to what are the county roads and what are not county roads. I mean, that's my opinion... (emphasis added)**

There was a further exchange later in the deposition with the Respondents' counsel questioning Professor Fisher as follows:

...Q. In this road, the general public is not serviced after it comes past the church, is that correct, if you only have two other pieces of property?

A. No, I don't see it that way.

Q. How do you see it?

A. I was raised in Hardy County on the River Road, the old River Road.

Q. Know where it's at.

A. And it dead ends. But there's never been any thought that it wasn't anything other than a public road for people to be able to get from, you know, here to the houses on the end. It was never viewed as a private road. So I don't have problem of a public road providing access and dead ending...

There is nothing in Respondents brief that rebuts the Petitioners' contention that the Respondents have not presented one witness, exhibit, document, recorded instrument, or fact of any kind to support the contention that the subject right-of-way meets any of the elements of a prescriptive easement as defined by the landmark WV cases or that it is not "a road" as shown in

the "official" "A. B. Brooks County Map of 1905", the U. S. Geological Survey Sheets Field Operations Bureau of Soils 1917", and the map of 1918 entitled "Map III of Upshur County and Western Portion of Randolph County Showing Topography West Virginia Geological Survey".

## CONCLUSION

It cannot be emphasized too strongly that the Petitioners' right of way in question is a neglected, but never abandoned, county road that is clearly shown on the Official A. B. Brooks Map of 1905, U. S. Geological Survey Sheets Field Operations Bureau of Soils 1917", and the map of 1918 entitled "Map III of Upshur County and Western Portion of Randolph County Showing Topography West Virginia Geological Survey".

The County of Upshur, by its Prosecuting attorney, when it was briefly and erroneously brought in as a party to this case by *sua sponte* order of the Court, confirmed that the road in question has never been abandoned, and Professor Fisher has testified, "probably as compelling as you can find as to what are the county roads".

Such a road, once recognized, will continue to exist, even if neglected.

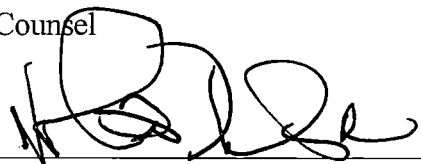
Professor Fisher testified, "I think they would have had to take some action to negate it.", which action neither the County or State ever took.

Thus, Petitioners have established the existence of the right of way as a county road by the highest conceivable standard.

The Respondents, while repeatedly asserting a claim that the subject right of way was created by prescriptive right, have conceded, simply by their admission, in every pleading filed to date including their brief, that there is no witness, no document, no piece of evidence, no newspaper article, no recorded instrument, no map, and no expert contrary to the opinion of

Petitioners' expert or to support their contention that the subject right of way, the existence of which they acknowledge, was created by prescriptive right or that Petitioners' right of way is not a road, with a right of way width of thirty (30) feet, plus slopes, set by West Virginia Code of 1918, Chapter 43, §1940-68.

Respectfully Submitted,
TIMOTHY J. GREGORY and
JANICE L. GREGORY, Petitioners
By Counsel



J. Burton Hunter, III
Counsel for Petitioners
J. Burton Hunter, III & Associates, P.L.L.C.
One West Main Street
Buckhannon, West Virginia 26201
(304) 472-7477
WV State Bar ID: 1827

## CERTIFICATE OF SERVICE

I, J. Burton Hunter, III, attorney for Timothy J. Gregory and Janice L. Gregory, do hereby certify that I served the foregoing ***Petitioners' Reply to Respondents' Brief*** upon the following counsel by depositing a true copy thereof in the United States Mail, with postage prepaid in envelopes addressed as follows:

Pat A. Nichols
Nichols & Nichols
Attorney at Law
Post Office Box 201
Parsons, WV 26287

Dated this 10th day of February, 2021.

J. Burton Hunter, III
One West Main Street
Buckhannon, WV 26201
(304) 472-7477
WV State Bar ID: 1827